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No. 06-984

In The
Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF EARTHRIGHTS INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Amicus agrees with petitioner that state courts must honor a treaty obligation of the United States, particularly where the President has sought to enforce that obligation. Arguments raised by the United States in earlier briefing in this case, however, raise the far broader question of whether the President has inherent, unilateral authority to preempt state criminal procedure law based on perceived interference with foreign policy, regardless of any authority to do so granted by statute, treaty, or executive agreement. This question, if addressed by the Court, could have implications regarding whether the Executive has the unilateral ability to preempt any generally applicable state law, including tort law, that is seen as a barrier to foreign policy objectives.

EarthRights International (ERI) is a non-profit human rights organization based in Washington, D.C., which litigates and advocates on behalf of victims of human rights abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims that arise partly out of conduct overseas. In *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), and in *Doe v. Unocal Corp.*, No. BC 237980 (L.A. Super. Ct.), which were settled in March 2005, ERI was counsel in litigation alleging that a California corporation was liable under, *inter alia*, California state law for its complicity in forced labor, rape, and murder carried out by Burmese soldiers. In *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.) and *Bowoto v. ChevronTexaco Corp.*, No.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no party other than *amicus* and its counsel authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief.

CGC-03-417580 (S.F. Super. Ct.), ERI is counsel in litigation alleging that a California corporation is liable under, *inter alia*, California state law for its complicity in murder and other abuses by members of the Nigerian security forces.

These cases support U.S. foreign policy by seeking to ensure that U.S. corporations are not complicit in human rights violations. Nonetheless, ERI has an interest in ensuring that generally applicable state law is not improperly preempted by federal executive conduct, and in particular that state-law tort claims are not improperly dismissed for perceived interference with federal foreign affairs powers.

STATEMENT OF THE CASE

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) (Avena)*, 2004 I.C.J. 128 (Judgment of Mar. 31), the International Court of Justice held that the United States violated the rights of Petitioner and fifty other Mexican nationals under the Vienna Convention on Consular Relations. On February 28, 2005, the President "determined . . . that the United States will discharge its international obligations under [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." President's Memorandum for the Attorney General, SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena* (Feb. 28, 2005) [hereinafter "determination"]. In prior proceedings in this case, the United States has argued that the "presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause." Brief for the United States as *Amicus Curiae* Supporting Respondent at 9, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); *accord id.* at

43–44; Brief for the United States as *Amicus Curiae* at 13, *Ex Parte Medellin*, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207). Thus, the Executive asserts the power to preempt state law where necessary to enforce the United States' international treaty obligations.[2]

Language in the Administration's prior briefing in this case, however, seems to propose a second rationale that contains no similar limitation on executive power. The government suggests that Article II grants the Executive the authority to create binding federal law that can preempt state law based solely on the Executive's foreign policy preferences, without regard to any statutory authority or international obligation. That is, the Administration has

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[2] Brief for the United States as *Amicus Curiae* at 22, *Ex Parte Medellin*, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207) (asserting the "authority of the President to determine the means by which the United States will implement its international legal obligations"); *id.* at 30 ("Just as the President may enter into an executive agreement to resolve a dispute with a foreign government, the President is equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government."); *accord* Brief for the United States as *Amicus Curiae* Supporting Respondent at 45, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). Likewise, petitioner argues that the Executive has the authority to enforce the United States' treaty obligations domestically because treaties are supreme under the Supremacy Clause, and that the "Take Care" clause affords the President the authority to ensure that the United States complies with existing treaty obligations. Petition for Writ of Certiorari at 21–22, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). "If the President's authority in international affairs includes the authority to conclude new agreements without Senate approval, then surely it includes the authority to ensure that the United States complies with existing obligations to foreign nations under treaties already ratified with the advice and consent of the Senate." *Id.*

argued that "[t]he President's authority to issue his determination rests not only on his authority to determine how the United States will respond to an ICJ decision, but also on the President's authority under Article II of the Constitution to manage foreign affairs." Brief for the United States as *Amicus Curiae* Supporting Respondent at 44, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928) (citation omitted); *accord id.* at 42; Brief for the United States as *Amicus Curiae* at 25, *Ex Parte Medellin*, ___ S.W. ___, 2006 Tex. Crim. App. LEXIS 2236 (Nov. 15, 2006) (No. AP-75,207); *id.* at 13 (claiming determination derives power to preempt from President's "constitutionally based foreign affairs powers" as well as from treaty and statute).

The narrow question *amicus* addresses is whether the President has, as the Administration seems to suggest, the unilateral authority to preempt generally applicable state law, based not on any authority to implement the United States' international legal obligations but rather based *solely* upon his determination that application of such law in a particular case will interfere with U.S. foreign affairs. As of the time of filing, of course, *amicus* does not know whether the Administration continues to suggest this rationale at the merits stage of this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with petitioner that state courts must honor an undisputed international obligation of the United States, under a duly ratified treaty, to give effect to the *Avena* judgment in the cases that the judgment addressed. Although this is particularly true since the President has sought to enforce that treaty obligation, such obligation would bind state courts even in the absence of Presidential implementation. Respect for international law has been a

fundamental federal concern since the Founding.[3] The argument that the President may enforce a treaty obligation (which is already part of federal law) contemplates narrowly circumscribed powers that are analogous to the President's power, previously recognized by this Court, to preempt state law through certain kinds of executive agreements. But the Court should neither consider nor adopt any extension of the President's preemptive power beyond this limited circumstance.

I. According to the Administration, two treaties and various statutes afford the President the authority to preempt state law in this case. Although the Administration has also suggested that executive authority to "manage foreign affairs" allows the President to unilaterally preempt state law, the Court should not reach the merits of this alternative rationale.

The President's authority is indisputably greater when he acts to enforce treaties or pursuant to statutes than when he acts independently of any such authorization, since the latter circumstance involves no congressional acquiescence. Accordingly, if the existence of these international treaty obligations and statutes is insufficient to afford the President the power to preempt, then the President cannot claim to derive such power from some amorphous, unilateral foreign

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[3] *See* U.S. Const. art. I, § 8 (granting Congress the power to define and punish offenses against the laws of nations); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–19 (2004) (detailing Framers' concern for international law); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l. L. 461, 484–88, 493 (1989) (noting that the Framers enacted the Alien Tort Statute to discharge the new nation's legal and moral duty to comply with international law.)

affairs authority. If, on the other hand (as *amicus* believes is the case), treaties or statutes provide a basis for preempting state law, there is likewise no occasion to consider whether any other basis for preemption exists.

II. Nonetheless, should the Court reach beyond the question of whether executive authority includes the power to require domestic law compliance with international law obligations or whether preemptive authority has been delegated by statute, it should conclude that the President does not have the unilateral power to enforce his foreign policy preferences or opinions as a matter of domestic law. The foreign affairs doctrine is a doctrine of preemption of state action by federal law. In this case, the only state action at issue is the application of ordinary criminal procedure rules. Facially neutral state law rules may not be preempted under any notion of "field preemption" in the foreign policy arena, because the state has not engaged in its own foreign policy with any direct effects on foreign relations. Moreover, because such rules fall within the traditional competence of the states, they cannot be preempted without a showing of a clear conflict with a federal statute or other federal action with the force of law.

The Executive lacks the authority to veto the application of state law rules or the adjudication of cases under state law simply because it believes they would somehow affect foreign relations. A Presidential conclusion that application of a state rule affects foreign policy is not, in and of itself, fit to preempt state law because it is not federal law. The mere existence of a Presidential policy does not confer upon the Executive the power to create preemptive law whenever foreign relations are involved. This Court has never afforded the Executive Branch such an unlimited power to unilaterally transform its policy preferences into preemptive law, nor has any of its foreign affairs preemption decisions

ever placed so much traditional state authority on such tenuous footing.

Instead, this Court has struck a delicate balance between state and federal prerogatives in existing foreign affairs preemption jurisprudence. Any suggestion that the Executive can preempt state law, based on general foreign affairs authority (rather than on authority delegated by statute or on executive authority to enforce international agreements or international law), would upset that delicate balance. Indeed, if the Executive could displace neutral state criminal procedure law based solely on a perceived effect on foreign relations, it is difficult to discern any principled limitation on its ability to do likewise regarding any case or statute the President believes impedes foreign relations. State tort, contract, tax, or any other state law, could all be preempted at the President's sole discretion, without any indication that Congress so intended. This Court should not recognize such an unchecked executive power to create domestic law solely at the discretion of the President.

Critically, the Court need not accept the Executive's broad "authority . . . to manage foreign affairs" rationale in order to find for the petitioner. Indeed, neither the Administration nor the petitioner has, in existing briefing, focused its arguments on this theory. The fact that the President lacks the authority to preempt state law based solely on his perception that it will impact U.S. foreign relations does not alter the fact that state courts must honor the United States' legal obligations. Accordingly, petitioner should prevail in this case.

ARGUMENT

I. THE SCOPE OF EXECUTIVE AUTHORITY TO PREEMPT STATE LAW IN THE ABSENCE OF A TREATY OR STATUTE IS NOT PRESENTED IN THIS CASE.

The Administration and petitioner argue that the Executive has the authority to preempt state law based in part upon two treaties — the Optional Protocol to the Vienna Convention and the U.N. Charter — as well as various statutes. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 10–13, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984); Petition for Writ of Certiorari at 20–22, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). Accordingly, this case presents the question of executive authority to enforce an international law obligation as a matter of domestic law or the exercise of statutory authority.[4] Yet the government has also suggested that it has the far broader authority to preempt state law based solely upon Presidential foreign affairs preferences. There is no reason for this Court to consider whether the Executive has that power.

Whatever the scope of executive power to preempt state law on foreign affairs grounds, that power is undoubtedly greater when the President seeks to enforce a treaty or is delegated authority under a statute than when no such treaty or statute is involved. Certainly, there can be no

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[4] The Court need not even reach that question if it holds, as *amicus* submits that it should, that the *Avena* judgment binds state courts independent of any presidential determination. *See* Petition for Writ of Certiorari at 26, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984).

argument that the Executive has *less* power in the former circumstance. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."); *Reid v. Covert*, 354 U.S. 1, 17 n.33 (1957) ("[I]t cannot be contended that [] an [executive] agreement rises to greater stature than a treaty."). Thus, the power to enforce a treaty or other international agreement is of necessity greater than any general foreign affairs authority standing alone.

There is no dispute that the United States has an international treaty obligation to comply with *Avena*. *See* Petition for Writ of Certiorari at 25–26, *Medellin v. Texas*, 127 S. Ct. 2129, 167 L. Ed. 2d 862 (2007) (No. 06-984). Petitioner should therefore prevail, without any reference to general foreign affairs authority, because the Executive can preempt state law in enforcing a treaty. But, if the Executive acting pursuant to its power to enforce that treaty obligation could not preempt state law, the Executive could not do so based solely upon any general foreign relations authority. Either way, there is no reason for this Court to consider whether a Presidential determination based solely on foreign policy preferences has the power to preempt state law.

This Court, of course, has a general policy to avoid deciding significant constitutional questions unnecessarily, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), and "never to formulate a rule of constitutional law broader than is required by the precise facts

to which it is to be applied," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 192 (2003) (internal quotation marks omitted). Accordingly, the Court should confine its analysis to the question of the Executive's authority to preempt state law in the specific circumstance of enforcing an international judgment rendered pursuant to a treaty of the United States, and its decision should make clear that no other question has been resolved.

II. RECOGNIZING UNILATERAL EXECUTIVE AUTHORITY TO PREEMPT STATE LAW, OUTSIDE THE CONTEXT OF THE ENFORCEMENT OF A TREATY AND WITHOUT STATUTORY DELEGATION, WOULD RAISE SUBSTANTIAL CONSTITUTIONAL CONCERNS.

The "foreign affairs" doctrine, first articulated in *Zschernig v. Miller*, 389 U.S. 429 (1968), preempts, in limited circumstances, state action that interferes with federal foreign policy prerogatives. Foreign affairs preemption is rare. In prior foreign affairs preemption cases, the action complained of has either been state judicial action that directly implicates foreign relations,[5] or the enactment of a statute or other policy that facially affects foreign affairs.[6]

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[5] *See Zschernig*, 389 U.S. at 440 (state courts engaging in "judicial criticism" of foreign regimes); *N.Y. Times Co. v. N.Y. Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (quasi-judicial city agency engaging in "inquiries into the righteousness of foreign law").

[6] *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 408–12 (2003) (California statute concerning insurance claims by Holocaust victims); *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1016, 1030 (9th Cir. 2003) (California statute allowing claims for WWII-era forced labor);

The doctrine actually encompasses two distinct forms of preemption. Conflict preemption considers whether state law interferes with an affirmative federal foreign policy. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–19 (2003) [hereinafter "*Garamendi*"]. Dormant foreign affairs review, or field preemption, considers whether state law intrudes upon federal prerogatives in the field of foreign policy, even in the absence of any affirmative federal activity or any conflict with such activity. *Id.*

In *Garamendi*, this Court considered whether unilateral executive action could preempt state law, and applied a form of conflict preemption. *Id.* at 419–20. *Garamendi* also noted that the decision in *Zschernig* represents a doctrine of field preemption in the field of foreign affairs. 539 U.S. at 418. If this Court were to consider whether the Executive determination at issue here has the power to preempt independent of any treaty or statute-based authority, *Garamendi* sets forth the applicable standards.

Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999) [hereinafter *Natsios*], *aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (Massachusetts statute targeting companies doing business in Burma); *Miami [illegible] v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180–8[illegible] 000) (ordinance targeting companies doing business in Cuba); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (state university policy targeting Iranians); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307-8 (Ill. 1986) (tax provision targeting South African coins).

A. Generally applicable state law rules must be evaluated under *Garamendi* "conflict preemption" analysis; field preemption analysis is inapposite.

The Executive's claim that the Presidential determination has independent legal force "and contrary state rules must give way under the Supremacy Clause" is a conflict preemption argument. *See* Brief for the United States as *Amicus Curiae* Supporting Respondent at 9, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928). There can be no argument that dormant foreign affairs review should apply here.

"Field preemption" is limited to situations in which a state "establish[es] its own foreign policy," *Zschernig*, 389 U.S. at 441, and is therefore inappropriate for generally applicable state law rules that have only indirect effects on foreign affairs.[7] Here, Texas has not created its own foreign

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[7] In applying Oregon's reciprocal inheritance statute, Oregon probate courts were inquiring into whether foreign regimes would confiscate property, and whether diplomatic statements were credible. *Id.* at 435. Because the law, as the Oregon courts applied it, made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own," and thus had a "direct impact upon foreign relations," *id.* at 440–41, it had to yield before the federal government's power to conduct foreign policy. But in an earlier case, this Court upheld a similar law against a foreign affairs challenge, holding that although the law would have "some incidental or indirect effect in foreign countries," the same would be "true of many state laws which none would claim cross the forbidden line." *Clark v. Allen*, 331 U.S. 503, 517 (1947). Thus, state laws whose transnational effects apply "without respect to whether the [relevant] country might be considered friend or foe" are not preempted. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990); *accord In re "Agent Orange" Product Liab. Litig.*, 373 F. Supp. 2d 7, 81 (S.D.N.Y. 2005) (ordinary application

policy; the generally applicable procedural default rule in question is not directed at issues concerning foreign affairs, let alone at a particular foreign country. *Zschernig* field preemption does not apply.

Field preemption is also inapplicable here because the state law here falls within an area of "traditional competence" for state regulation. *Garamendi*, 539 U.S. at 420 n.11. Actions within the "traditional competence" of a state — including the creation of neutral criminal procedure rules or ordinary tort causes of action — can be preempted only upon

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of state tort law poses no risks of impermissible interference in foreign affairs); *Mukaddam v. Permanent Mission of Saudi Arabia*, 111 F. Supp. 2d 457, 473 (S.D.N.Y. 2000) (application of statute of general application to foreign government permissible if it "does not curtail the rights of foreign citizens or attempt to structure a relationship between New York, its residents, and any other country"); *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 266 (N.M. 1980) (because "the causes of action involved in this case are universally accepted by American jurisdictions," the *Zschernig* doctrine "has nothing to do with this case"); *Amarel v. Connell*, 248 Cal. Rptr. 276, 281–82 (Cal. Ct. App. 1988) (*Zschernig* inapplicable to laws which are "neutral in their application"). State action can only be struck down if it has a *direct* impact on foreign relations. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (analyzing caselaw and determining that "state enactments" that ran afoul of *Zschernig* "not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct"); *Natsios*, 181 F.3d at 45 (invalidating state boycott of firms that do business in Burma); *Miami Light Project*, 97 F. Supp. 2d at 1180–81 (county's boycott of firms doing business in Cuba likely invalid); *Tayyari*, 495 F. Supp. at 1378 (invalidating state university discrimination against Iranian students, designed to express condemnation of Iran); *Springfield Rare Coin Galleries*, 503 N.E.2d at 307–8 (invalidating state tax provision that discriminated against South African coins to express disapproval of South Africa); *N.Y. Times Co.*, 361 N.E.2d at 968–69 (invalidating agency's ruling that discriminated against advertisements for employment in South Africa).

a clear conflict between the policy adopted in "[t]he exercise of the federal executive authority" and the policy adopted by the state. *Id.* at 421. Footnote eleven of *Garamendi* suggests that the *Zschernig* concept of foreign affairs field preemption should apply only where a state "simply . . . take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility"; in such a case, the degree of conflict with federal policy is immaterial, since "the Constitution entrusts foreign policy exclusively to the National Government." *Id.* at 420 n.11. In contrast, where "a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict." *Id.* (internal citations omitted).[8]

Although technically *dicta*, the dichotomy espoused in footnote eleven is in accord with the presumption that the federal government "does not intend to pre-empt areas of traditional state regulation." *FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that preemption is not presumed when the federal government acts "in a field which the States have traditionally occupied"). Thus, consistent with *Garamendi*, this Court should "require a conflict" before preempting action within the "traditional competence" of the states. *Garamendi*, 539 U.S. at 420, n.11 (internal citations and punctuation omitted).

Under this rule, only conflict preemption applies in

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[8] In this footnote, the *Garamendi* Court specifically analyzed the distinction between the *Zschernig* majority, which struck down the state statute without reference to a specific conflict, and Justice Harlan's concurrence, which justified the result on a conflict with a treaty. *See Zschernig*, 389 U.S. at 462 (Harlan, J., concurring). What *Garamendi* characterized as "field preemption" was the notion that "even in absence of a treaty, a State's policy may disturb foreign relations." *Zschernig*, 389 U.S. at 441.

this case because state criminal procedure is indisputably a matter of traditional state authority.

B. Under *Garamendi* "conflict preemption," laws that fall within the core of states' traditional competence cannot be preempted unless there is an actual exercise of federal preemptive authority.

Foreign affairs conflict preemption requires two elements. First, the court must identify federal action that is "fit to preempt state law"; in *Garamendi*, this took the form of an executive agreement. 539 U.S. at 416. Second, the court must determine that there is a "clear conflict" between the "express federal policy" and the state action. *Id.* at 420.

As noted above, *amicus* submits that the treaties upon which the government relies afford the President the power to exercise federal preemptive authority. To the extent, however, that the Administration suggests that the determination would have preemptive effect based solely upon the Executive's foreign policy preferences, it is mistaken. The President's determination would not be a valid exercise of federal preemptive authority in the absence of a treaty or other international obligation, or of a statute granting the Executive such authority. A unilateral determination that a state case, rule or statute might interfere with foreign relations lacks the force of law, and therefore is not an exercise of federal executive authority that could preempt state law.

1. A statement by the executive that application of a state rule affects U.S. foreign policy is not, in and of itself, fit to preempt state law because it does not carry the force of law.

Under the Supremacy Clause, certain specific acts — the "Constitution," the "laws of the United States," and "treaties" — are the "supreme law of the land," and can therefore preempt state law. U.S. Const., art. VI, § 2. Generally applicable state law, therefore, can be preempted only pursuant to an action of the political branches carrying the force of law; federal acts that do not have the force of law cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants Executive Branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[9]

Garamendi, of course, did conclude that executive agreements may preempt conflicting state law, despite the fact that they are not listed in the Supremacy Clause. But such agreements are "legally binding," *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994), and have long been held to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United*

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[9] Nothing in the majority opinion in *Garamendi* conflicts with this point from the dissent.

States v. Pink, 315 U.S. 203 (1942)). The President's power to make such agreements has "been exercised since the early years of the Republic," and, at least with respect to agreements settling claims of American nationals against foreign governments, the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. The Government's suggestion that, by invoking foreign affairs, the President has the power to preempt state law even in the absence of any international agreement or obligation is a long way from the limited preemptive power recognized in *Garamendi*.[10] Indeed, the Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law, for example, and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted).

This Court's decision in *Barclays Bank* is instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that *amicus* briefs or letters from the Administration to a state governor had the power to preempt, because they "lack the force of law." 512 U.S. at 328–30 & n.30. The Court had no occasion to resolve the question actually at issue in this case, declining to consider "the scope of the President's power to preempt state law

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[10] Although *Garamendi* relied on statements made by sub-Cabinet officials to shed light on the policy animating the executive agreements, *see* 539 U.S. at 411, 422, its analysis does not suggest that such a statement alone may have preemptive force, or that the state statute at issue would have been preempted in the absence of an executive agreement.

pursuant to authority delegated by a statute or a ratified treaty." *Id.* at 329.

The President generally has the power to execute federal law, not to unilaterally create it. *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *accord Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74, 165 L. Ed. 2d 723 (2006). Indeed, both *Youngstown* and *Hamdan* rejected Executive assertions of the authority to make law regarding matters specifically related to foreign relations. *Youngstown*, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of the Korean War); *Hamdan*, 126 S. Ct. at 2759 (rejecting procedures President established to try prisoner captured during war). To the extent the Administration suggests here that it may preempt state law based solely on Executive Branch foreign policy preferences, even in the absence of an executive agreement, a treaty obligation, or statutory authority, it seeks to radically expand *Garamendi* and effectively to amend Article II and the Supremacy Clause.

2. *Garamendi* is a limited exception to the Tenth Amendment principle that only express Congressional action can limit the historic powers of the states, and should not be extended to permit preemption by mere Executive Branch fiat.

Affording preemptive power to the Executive's foreign policy preferences, independent of executive authority to enforce a treaty or other international obligation or authority delegated by statute, would countenance an

extraordinary usurpation of state and congressional power by the Executive Branch and the courts. The Tenth Amendment protects States from undue encroachment of federal authority; states retain a "residuary and inviolable sovereignty." *New York v. United States*, 505 U.S. 144, 188 (1992); *see also United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting government argument that would place no limits on federal authority in areas where states traditionally have been sovereign).

Limits on traditional state authority typically can be created only by Congress. To infringe upon historic state powers, Congress must make its intent "unmistakably clear in the language of [a] statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1990) (internal punctuation omitted). Courts may not "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Id.* at 464 (emphasis in original) (quoting Laurence H. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). *Gregory* required a plain statement of intent to preempt historic state powers specifically to "avoid a potential constitutional problem." 501 U.S. at 464.

In *Barclays Bank*, this Court considered whether a state tax law was preempted by the foreign commerce clause because it purportedly interfered with the Federal Government's ability to speak with one voice in international trade. 512 U.S. at 320. The state law had engendered considerable diplomatic protest from other nations. *Id.* at 324, n.22. This Court, however, held that only Congress, not the President or the Judiciary, has the authority "to evaluate whether the national interest is best served by [] uniformity, or state autonomy." *Id.* at 328–29, 331. Indeed, the Court disavowed any competence to determine whether a state law interfered with Congress' ability to speak with the voice of the nation in foreign affairs, or whether conversely Congress

had decided to allow the state to act. 512 U.S. at 324–31. Noting that "[t]he judiciary is not vested with the power" to decide how to balance the competing concerns involved, *id.* at 328, the Court presumed that a lack of "specific indications of congressional intent to bar" state law affecting foreign commerce indicates "Congress' willingness to tolerate" such law. *Id.* at 324, 327; *accord id.* at 332 (Scalia, J., concurring) (noting that the Court's decision "requires no more than legislative inaction to establish that 'Congress implicitly has *permitted*'" state's law) (quoting *id. at* 326) (emphasis in original).

To be sure, *Barclays Bank* was based in part on the fact that "the Constitution grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting U.S. Const. art. I, § 8, cl. 3). But *Barclays Bank* also implicitly recognizes that, in areas other than foreign commerce, the President's preemptive foreign affairs powers derive either from a congressional grant of authority or from an executive agreement. Although the situation was not presented in *Barclays Bank*, this Court noted that, in another case, Congress might delegate preemptive authority to the President "by a statute or a ratified treaty." *Id.* at 329. In the absence of such a delegation, this Court only contemplated that the President might preempt state law "pursuant to a legally binding executive agreement." *Id.* The Court specifically declined to consider when such unilateral executive action might preempt state law precisely because the only Executive Branch communications at issue in *Barclays Bank* were those "that express federal policy but lack the force of law." *Id.* at 330. A Presidential directive, such as the determination at issue here, cannot carry the force of law simply because the President declares that it does. The only mechanism even contemplated by *Barclays Bank* through which the Executive might preempt traditional state authority

without congressional action is an executive agreement. *Barclays Bank* would be nullified if the Executive could preempt state law based on some general foreign affairs authority.[11]

Garamendi can be seen as an exception to the rule requiring explicit congressional direction to override historic state powers, since the Court noted that a clear conflict with the policy reflected in the executive agreement is "alone enough" to require preemption of state law. 539 U.S. at 425. Given, however, the Tenth Amendment concerns at stake, this Court should reject any argument seeking unprecedented expansion of *Garamendi* to permit preemption by mere memorandum of the President, in the absence of any finding that such authority has been conferred on the President through a particular treaty, other international obligation or statute.

Under *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985), state sovereignty is usually protected against federal intrusion by states' representation in the federal political process. Allowing federal courts to override historic state powers without explicit congressional direction "would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (quoting Tribe *supra*, § 6-25 at 480). These concerns counsel strongly against expansion of *Garamendi* to permit preemption based solely on Presidential policy preferences, for two reasons.

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[11] Indeed, since international trade policy is a facet of U.S. foreign policy, affording the President general foreign affairs preemptive power might allow the President unilaterally to regulate international commerce through preemption of state rules, in violation of the foreign commerce clause, by simply declaring that such action was taken pursuant to his authority to "manage foreign affairs."

First, the requirement that the President must take the public, high-profile step of negotiating and signing an executive agreement — or equivalent action with the force of law — affords a measure of political protections to states. Those protections would be eviscerated if the President can preempt state law by simply determining that its application would affect foreign policy. Second, "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693 (1997). In contrast, "the erroneous federalization of [state] law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity." *Id.* at 1694. Thus, if a state goes too far in intruding upon foreign relations, the political branches can protect themselves; if this Court goes too far in preempting state law, states are largely helpless.[12]

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[12] Tenth Amendment concerns do not apply to the argument that the President's determination has preemptive effect pursuant to treaty-based authority. *See Reid*, 354 U.S. at 18 ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."); *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that, in determining whether treaty and statute improperly interfere with states' rights, "it is not enough to refer to the Tenth Amendment . . . because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States . . . are declared the supreme law of the land."); Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. d (1987) (Tenth Amendment does not limit the power to make treaties).

CONCLUSION

For the foregoing reasons, *amicus* urges that the issue of Presidential authority to preempt state law independent of the enforcement of a treaty or of a statutory grant is not presented and need not be reached in this case. If this Court were to reach that issue, it should conclude that the President lacks the unilateral authority to create federal law with preemptive power over generally applicable state law rules by simply determining that state law impedes foreign relations, and should reiterate that such state law can only be preempted upon a showing of an actual conflict with federal law that has preemptive force. Nonetheless, the state court was required to uphold the clear treaty obligation of the United States. Accordingly, petitioner should prevail.

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